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REPORT OF ADVISORY COMMITTEE ON 2010 AMENDMENTS TO ARTICLE 9 OF THE UNIFORM COMMERCIAL CODE – SECURED TRANSACTIONS

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A. Overview and Recommendation:

The Connecticut Law Revision Commission at a meeting on October 26, 2010 undertook a review of the revisions to Article 9, Secured Transactions, of the Uniform Commercial Code (“UCC”) that were promulgated by the American Law Institute and the National Conference of Commissioners of Uniform State Laws in 2010.

The Commission review was conducted by a Commission Advisory Committee co-chaired by Commission members Neal Ossen and Thomas J. Welsh. The Advisory Committee included a group of advisors selected on the basis of their expertise in commercial law and transactions, real estate law and transactions and consumer matters and a representative of the Connecticut Bankers Association as well as staff members from the Office of the Secretary of the State. Mr. Richard Taff from the Office of the Legislative Commissioners provided staffing for the Advisory Committee and attended the meetings. Also a representative from the Office of Legislative Research attended these meetings and received the written materials that were distributed. A list of the advisors and staff members that attended the meetings is attached.

The Advisory Committee met on November 4, 2010, November 18, 2010, November 30, 2010 and December 16, 2010 and reviewed all of the proposed revisions and additions to UCC Article 9, as well as Connecticut statutes, common law and practice associated with each of the suggested changes. The Advisory Committee found that the suggested revisions are relatively uncontroversial corrections and refinements of UCC Article 9 – which had been extensively revised and rewritten by the 2001 amendments enacted in Connecticut by Public Act 01-132. The 2010 revisions arose as the result of a few court decisions and non-uniform amendments in a number of states, most notably regarding the issue of what constitutes the name of an individual as a debtor. Since the need for a technical revision to correct some aspects of Article 9 was

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apparent, the drafters added provisions to clarify portions of the statute that had proved problematical and to address a few court decisions in other states that had incorrectly interpreted provisions of Article 9, as well as to anticipate and prepare for future adoption of the Model Entity Transactions Act and similar laws.

In the course of their work, staff from the Office of the Legislative Commissioners prepared the attached draft adapted for enactment in Connecticut. The draft includes necessary amendments to conform the uniform text to Connecticut law and practice and to incorporate the concerns raised by the Office of the Secretary of the State. The Advisory Committee also unanimously recommended the adoption of so-called "Alternative B" in this draft relating to the name of individual debtors – which alternative adopts a 'safe harbor' approach making the name of an individual shown on the individual's Connecticut motor vehicle operator's license or identity card one of the names that would be sufficient on a financing statement, in addition to the names permitted under current law as well as the first personal name and surname of the individual. The Advisory Committee commercial law experts felt strongly that adoption of the "Alternative A" rule, making the name shown on the motor vehicle operator's license the only permitted name, would be a major change that could cause existing financing statements for individuals to become ineffective upon any simple change in a driver's license – also, the Office of the Secretary of the State warned that its computerized filing system and that of the Department of Motor Vehicles were entirely separate systems that might not be fully compatible at this time and either system could be changed in the future without notice to or coordination with the other office or department, so that significant expenditures of state money might have to be devoted to upgrade these systems and to coordinate them in the future if so-called "Alternative A" was adopted.

Consumer representatives on the Advisory Committee and who were consulted on the proposed changes expressed the opinion that these changes did not adversely affect consumer issues and did not alter policy decisions or compromises made when Revised Article 9 was adopted in 2001.

Because of the strong interest in uniformity in the area of commercial law, in general, and in the law of security interests in personal property that underlies most commercial finance, in particular, the Advisory Committee recommends enactment of the 2010 revisions to UCC Article 9 as set forth in the attached enactment draft.

B. History of Article 9 Revisions and Goals of the Review Process:

1. History of Connecticut Adoption and Amendment of Revised Article 9: In 1998 a major revision of Article 9 of the UCC was approved by the National Conference of Commissioners on Uniform State Laws and the American Law Institute with a uniform national effective date of July 1, 2001. In Connecticut the Law Revision Commission formed a study committee on March 1, 2000 to study these revisions to Article 9. The report of the Commission to the Judiciary Committee of the General Assembly was dated December 21, 2000, with a supplementary report dated January 11, 2001. The Law Revision Commission recommended

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adoption of these revisions and provided draft text for consideration by the General Assembly. These revisions to Article 9, with minor amendments in the adoption process were enacted in Connecticut as Public Act 01-132, with an effective date of October 1, 2001.

Since the date of the original enactment of revised Article 9 in 2001 several revisions to UCC Article 9 have been adopted. In 2003, Public Act 03-62 was passed to correct a number of technical problems with the original text of Revised Article 9 adopted in Connecticut. This was an effort by practitioners (including a co-chair of this Advisory Committee), state officials and the Connecticut Bar Association to address mostly technical drafting problems found in certain Revised Article 9 provisions and in other statutes that referenced Revised Article 9. In addition, in 2004, in response to concerns by the public finance bar over potential application of Revised Article 9 to public finance transactions, the General Assembly passed revisions in a budget implementation bill, Public Act 04-2, to, among other things, provide an exception to the scope of Revised Article 9 for public finance transactions, conditioned upon the existence of other statutory provisions providing the minimum requisites for creation of such liens and their enforceability against third parties. This Act also deleted the prior option of many state authorities to 'opt in' to Revised Article 9.

Finally, in 2008 the National Conference of Commissioners on Uniform State Laws and the American Law Institute formed a joint study committee to review the operation of Revised Article 9 in practice. The study committee determined that there were a number of discrete issues to be addressed and a drafting committee was formed late in 2008 that addressed appropriate statutory changes. Revisions to the Official Comments to Article 9 were also drafted to provide additional guidance to judges and practitioners relating to issues where changes to the statute were not deemed advisable or warranted. The drafting committee's revisions to the statutory text of Revised Article 9 were approved by the American Law Institute on May 17, 2010 and by the National Conference of Commissioners on Uniform State Laws during the summer of 2010 (the "2010 Uniform Official Text").

2. Standards Employed in the Amendment and Connecticut Review Process:

The Advisory Committee noted that the national drafting committee considered the following standards in making the revisions to Revised Article 9 in the 2010 Uniform Official Text:

- No changes should be made that would alter policy decisions made during the 1998 revision unless the current provisions appear to be creating significant problems in practice.
- Recommendations for statutory change should focus on issues as to which ambiguities have been discovered in existing statutory language, where there are substantial ambiguities in practice under the current provisions, or as to which there have been significant non-uniform amendments in one or more jurisdictions that suggest the need to consider revisions.

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- Issues should be handled by a revision to the Official Comments rather than to the statutory text whenever the statutory language is sufficiently clear and produces the desired result, but judicial decisions or experience in practice indicates that some clarification might be desirable.

In addition to the foregoing considerations, Co-Chair Welsh recommended that the Advisory Committee adopt the following standards for their review and for recommendations as to any deviations from the 2010 Uniform Official Text in Connecticut:

- The policy decisions made in the 2001 adoption of Revised Article 9 in Connecticut should be preserved whenever possible, unless the change is necessary to give effect to the change recommended in the 2010 Uniform Official Text and provided that any parties that were proponents for these policy decisions are advised and given the opportunity to address the proposed change.
- Changes should not be made to the 2010 Uniform Official Text unless necessary due to deviation from Connecticut law or practice, to reduce any resulting ambiguity or to preserve the policy decisions made in the 2001 adoption of Revised Article 9 in Connecticut. Adherence to the uniform text to the greatest degree possible will advance the goal of the Uniform Commercial Code in Connecticut, as noted in Conn. Gen. Stat. §42a-1-103(a)(3), to “make uniform the law among the various jurisdictions”, and thereby to permit decisions in other states relating to the uniform text to be persuasive authority to be cited to courts in the State of Connecticut.

In general, the Advisory Committee review and discussion employed the above standards and revised the text in the accompanying enactment draft as little as possible from that of the 2010 Uniform Official Text.

C. Significant Specific Issues and Alternatives Addressed: The following were the most significant issues addressed in the review and revision of the 2010 amendments to UCC Article 9. (Additionally there are a number of revisions not discussed below, as the Advisory Committee considers them to be technical, noncontroversial and mostly conforming changes.)

1. Alternatives for Names of Individual Debtors: The single most significant decision to be made relating to alternatives set forth in the 2010 Uniform Official Text is to determine which alternative to adopt relating to the name to be specified on a financing statement for a debtor that is an individual (a natural person). This change resulted from a number of cases that had been reported relating to uncertainty of courts as to exactly what was the name of an individual for purposes of Revised Article 9 and non-uniform amendments made by certain states, most notably Texas and Nebraska, making the name shown on the driver’s license (or other state-issued identification card) the sole permitted name for use on a financing statement for an individual debtor. The 2010 Uniform Official Text provided two alternatives to allow each state to determine whether to adopt the driver’s license name ‘only’ (mandatory) model or the driver’s license name ‘safe harbor’ model. Specifically, “Alternative A” in the 2010 Uniform Official Text makes the name shown on an individual’s unexpired driver’s license

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(or state-issued identification card) the sole name permitted on a financing statement to perfect a security interest relating to that individual or the first personal name and surname of an individual without a current driver's license or state identification card. "Alternative B", on the other hand, makes the name of an individual shown on the driver's license or state identification card one of the permitted names, in addition to the first personal name and surname of the individual and/or the actual name of the individual as determined under state law.

An American Bankers Association working group has expressed a preference for "Alternative A," although it appears that secured creditors generally are of the view that adoption of either "Alternative A" or "Alternative B" would be an improvement over the individual debtor's name provisions in existing Revised Article 9. Additionally, drafters of the 2010 Uniform Official Text have noted that "Alternative A" is not feasible if a significant number of names reflected on drivers' licenses issued by a given state cannot be entered into that state's Uniform Commercial Code database, whether due to character set or field size discrepancies or other technical reasons.

After considerable discussion and research the members of the Advisory Committee strongly recommended the adoption by the State of Connecticut of "Alternative B", the 'safe-harbor' model, for the following reasons:

- The requirement that the name of an individual on a financing statement be limited to the name shown on the motor vehicle operator's license or state-issued identification card is a major change from current law that could have the effect of invalidating existing financing statements over relatively minor omissions or additions, such as the omission or addition of a middle initial or a middle name.
- Under 'Alternative A' any change in a name on a motor vehicle operator's license after it is issued or upon renewal (as well as expiration or nonrenewal of an operator's license) could constitute a change in the name of the debtor under Conn. Gen' Stat. §42a-9-507(c), which in turn could render the financing statement ineffective for collateral acquired more than four months after the change unless a correcting amendment is filed. This would be particularly important in cases where an individual was operating a business as a proprietorship or in a general partnership.
- The Office of the Secretary of the State advised the Advisory Committee that their existing computerized filing system and the system for searches of their UCC records utilize a limited set of alphanumeric characters that are permitted in a financing statement and for searches. The computer system employed by the Department of Motor Vehicles for motor vehicle operator's licenses and state identity cards is an entirely separate system that could use a different character set and have different field size limitations than the system of the Office of the Secretary of the State. Therefore, the adoption of "Alternative A" could create instances in which the exact required name from Department of Motor Vehicle records could not be entered onto financing statements in, or searched on the records of, the Office of the Secretary of the State.

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- The Advisory Committee and the Office of the Secretary of the State felt that if “Alternative A” was selected it would be very important to harmonize the name conventions, field sizes and other technical aspects of the computer systems of the Department of Motor Vehicles and the Office of the Secretary of the State to avoid creating a situation in which it could be impossible to file a proper financing statement with the Office of the Secretary of the State because the exact name of the individual debtor shown on the Department of Motor Vehicles system was incompatible with the allowable name conventions in the computer system of the Office of the Secretary of the State.
- The Office of the Secretary of the State advised the Advisory Committee that the cost to the State to study and revise the computer systems of the Office of the Secretary of the State and the Department of Motor Vehicles to support “Alternative A” could be substantial and they could not recommend allocating resources necessary for this task at this time.

Notwithstanding the distribution of this draft report and written materials and the discussions in meetings of the Advisory Committee, no party has expressed any objection to selection of the “Alternative B” ‘safe harbor’ approach recommended by the Advisory Committee.

Although the Advisory Committee has been informed that a few other states currently studying this issue might be recommending enactment of “Alternative A”, it is the strong opinion of the Advisory Committee that enactment of “Alternative B” is the better alternative for the State of Connecticut.

2. Model Entity Transactions Act: The 2010 Uniform Official Text modified the definition of entities designated as “registered organizations” under Revised Article 9 to reflect the fact that model statutes and statutes adopted in some states after the adoption of Revised Article 9 may permit the direct consolidation or redomestication of such entities in a different state than in which they were originally formed. Under prior law such changes were generally only possible indirectly – though mergers or similar mechanisms that were anticipated in the earlier text of Revised Article 9. The 2010 Uniform Official Text defines the term ‘public organic record’ to mean the certificate of incorporation or similar document that is filed and effective to govern an entity. An entity’s ‘public organic record’ would be used for certain Revised Article 9 purposes – including, without limitation, such matters as the proper name of the entity for financing statements and the proper jurisdiction in which to file financing statements. This definition and changes in the 2010 Uniform Official Text were intended to conform to the meanings of the same terms in the Model Entity Transactions Act that had been drafted by the National Conference of Commissioners on Uniform State Laws and which has been adopted in several states.

It came to the attention of the Advisory Committee that the Business Law and Tax Sections of the Connecticut Bar Association have been working on a proposed draft of proposed legislation to be submitted to the General Assembly in 2011 to adopt provisions of the Model Entity Transactions Act in Connecticut (“CT META”). Co-Chair Thomas Welsh met with the

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Connecticut Bar Association drafting committee relating to this draft proposed legislation and reviewed the current draft of their work and provided copies to the Advisory Committee. Although the Advisory Committee noted that certain questions may exist in the proposed CT META draft – for example, over exactly which ‘public organic record’ is determinative for purposes of Revised Article 9 – the Advisory Committee did not believe that any change should be made to the provisions in the 2010 Uniform Official Text on this issue and that any questions should be resolved if and when CT META is submitted for consideration by the General Assembly. The Co-Chairs of the Advisory Committee will continue to coordinate with the Connecticut Bar Association drafting committee on CT META to provide assistance in conforming CT META to the attached proposed revisions to Revised Article 9.

3. Decedent’s Estates as Debtors: The 2010 Uniform Official Text modified the provisions of UCC §9-503(a)(2), relating to the proper name for a financing statement when the debtor is a decedent’s estate. The 2010 Uniform Official Text employed the term “personal representative” of a decedent to refer to the fiduciary of a decedent’s estate. Although Connecticut statutes (*i.e.* Conn. Gen. Stat. §45a-390) define the term “fiduciary” to refer to this position, the Advisory Committee felt that no change was needed to this term in the 2010 Uniform Official Text for enactment in Connecticut since this term could include parties that were ‘personal representatives’ of a decedent’s estate in ancillary proceedings in other jurisdictions and since there was very little likelihood of confusion over the meaning of this term.

In addition, considerable discussion ensued in the Advisory Committee over the question of whether the revision to Conn. Gen. Stat. §42a-9-503(a)(2) would require an amendment to a financing statement that had been filed prior to the death of the debtor to continue the effectiveness of the financing statement, since the pre-death financing statement would presumably not contain the required ‘indication’ that the debtor was an estate. The Advisory Committee determined that an amendment to the pre-death financing statement should not be required to maintain the effectiveness of the financing statement, at least for collateral acquired by the individual debtor prior to death. Further, since, pursuant to Conn. Gen. Stat. §42a-9-506(c), a search of the UCC records in the Office of the Secretary of the State under the name of the decedent utilizing its current search logic would reveal the financing statement (since the estate ‘indication’ is not currently searchable) an argument can be made that the financing statement is not materially misleading and will continue to perfect a security interest in collateral acquired more than four months after the death of the debtor even without an amendment to indicate the estate nature of the debtor. [Of course, if the search logic of the Office of the Secretary of the State should change to allow a search for the estate ‘indication’ this argument would no longer be applicable.]

4. Revisions to Official Comments and Relevance of Official Comments in Connecticut: Notwithstanding the fact that the State of Connecticut does not formally adopt official comments to the Uniform Commercial Code as part of the enactment of the associated statutes, and consequently it was not necessary to submit proposed 2010 revisions to the Official Comments for UCC Article 9 to the General Assembly for approval, the Advisory Committee reviewed the proposed and final revisions to these Official Comments. This brief review was

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intended to determine whether any revision to the Official Comments would affect any of the policy decisions made in the Connecticut enactment of Revised Article 9 – so that an appropriate statutory override could be crafted if necessary. The review of the 2010 revisions to the Official Comments to Article 9 revealed no inconsistency between these changes and any Connecticut statute or policy that would require a change to the statutory provisions.

A considerable discussion occurred in the Advisory Committee, however, over the relevance and use of Official Comments in the interpretation of the Uniform Commercial Code, in general, and of Revised Article 9, in particular. This discussion occurred in the context of Conn. Gen. Stat. §1-2z:

“The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered.”

Notwithstanding this statute, which was adopted in 2003 well after the adoption of the Uniform Commercial Code and of Revised Article 9, the Advisory Committee felt that reference to the Official Comments by practitioners and by the courts to assist in determining the meaning and purposes of the Uniform Commercial Code (including the 2010 revisions to Revised Article 9) was warranted.

This position is supported by the general provisions of the Uniform Commercial Code, adopted in Article 1, which specify, in Conn. Gen. Stat. §42a-1-103(a), that:

This title shall be liberally construed and applied to promote its underlying purposes and policies, which are:

- (1) To simplify, clarify and modernize the law governing commercial transactions;
- (2) To permit the continued expansion of commercial practices through custom, usage and agreement of the parties; and
- (3) To make uniform the law among the various jurisdictions.

The goal of uniformity in subsection (3) above justifies reference to the Official Comments and case law from other jurisdictions as persuasive authority for interpretation of the provisions of the UCC and, in this context, Revised Article 9 (including without limitation the 2010 revisions thereto).

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In addition, the Report and Recommendation of the Connecticut Law Revision Commission to the Judiciary Committee dated December 21, 2000, relating to the review and adoption of Revised Article 9 in 2001, stated, on page 2 thereof, that

Because the proposed revisions are to existing Article 9, which Connecticut has substantially enacted, *the summary of the proposed revision that is set out in the commentary to the Official draft applies to the Connecticut draft* except with respect to the limited nonuniform amendments noted below. . . . *With respect to proposed revisions to particular sections, resort should be made to the official comments to those sections in the Official draft.* (emphasis added)

Senator Coleman, in introducing Revised Article 9 as S.B. 1226 in the Connecticut Senate in 2001 also stated that “courts in Connecticut and in the other states look to the experience of other states, *as well as to the official comments of the drafters of a uniform law* in interpreting their commercial statutes” (emphasis added). [Senate Session Transcript, May 31, 2001.] It is also well established that the courts in Connecticut have referred to the Official Comments when interpreting provisions of the Connecticut UCC, including Article 9. See for example, *Hall v. DeChello Distributors, Inc.*, 6 Conn. App. 530, 506 A.2d 1054 (1986), cert. denied, 200 Conn. 807, 512 A.2d 230 (1986) [The purposes and policies of the UCC “are explained in the Official Comments which accompany each section of the Uniform Commercial Code.”] and *Laurel Bank and Trust Co. v. Mark Ford, Inc.*, 182 Conn. 437, 438 A.2d 705 (1980) [referring to the Official Comments in construing Article 9].

Based on the foregoing it is clear that the courts and practitioners should be able to rely upon the Official Comments to assist them in determining the meaning of the provisions of Revised Article 9 (including the 2010 revisions thereto).

5. Expanded Four-Month Rule for Effectiveness of Financing Statement After Change in Location: The 2010 Uniform Official Text revised the provisions of UCC §9-316 by adding new subsections (h) and (i) to allow a financing statement to continue to be effective to perfect a security interest in after-acquired property for up to four (4) months after the debtor changes its location to another jurisdiction or after a “new debtor” in another jurisdiction becomes bound by the debtor’s security agreement. If the secured party perfects its security interest in the new jurisdiction before the expiration of the four-month period (or before the earlier lapse of the prior financing statement) the security interest would continue – otherwise the perfection will lapse as against a bona fide purchaser of the collateral.

This new rule for ‘new debtors’ supplants the non-uniform one-year provision adopted in 2001 in Conn. Gen. Stat. §42a-9-316(a)(4), which had been necessary due to the perceived absence of a rule in the earlier official draft of Revised Article 9. Since these new subsections of §9-316 in the 2010 Uniform Official Text now provide a more comprehensive set of rules in the ‘new debtor’ situation, the Advisory Committee recommended the adoption of the 2010 Uniform Official Text on this point and the deletion of the non-uniform Connecticut provision.

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6. Adoption of Revised Forms By the Office of the Secretary of the State:
Notwithstanding the provisions of §9-521 of the 2010 Uniform Official Text, the Advisory Committee, with the concurrence of the representatives from the Office of the Secretary of the State, decided not to revise the provisions of Conn. Gen. Stat. §42a-9-521, which permits the Secretary of the State to prescribe the forms that will be acceptable for filing. The national form financing statement and amendment forms are being amended in the 2010 Uniform Official Text; however the Secretary of the State will retain the authority to adopt and to amend the national and local forms for filing as in the current law. The Advisory Committee did not believe that it was necessary or desirable to write the specific content of these forms into the statutory provisions of Revised Article 9, as changes to these forms may be made administratively by the affected state officers if necessary. This policy was established in the adoption of Revised Article 9 in 2001 and the Advisory Committee did not see any compelling reason to recommend a change.

Based upon the substantial work and analysis by the Advisory Committee and staff and the discussions and comments by the various experts and constituencies included in the review process, the Advisory Committee recommends enactment of the 2010 revisions to Revised Article 9 as set forth in the attached enactment draft.

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